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OFFICE OF THE SECRETARY

March 5, 2002

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Com'n
Room 5-C450
445 12th St., SW
Washington, D.C. 20554Mr. W. Kenneth Ferree
Chief, Cable Services Bureau
Federal Communications Com'n
Room 3-C740
445 12th St., SW
Washington, D.C. 20554Re: *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33

Dear Ms. Attwood and Mr. Ferree:

The Commission recently adopted "tentative conclusions" in its *Wireline Broadband Internet Access NPRM* to the effect that: (1) wireline broadband Internet access services are "information services" under the '96 Act; and (2) the transmission component of such services constitutes "telecommunications" rather than "telecommunications service."¹ Since the February 15th issuance of the text of the *NPRM*, these tentative conclusions have been cited by ex partes submitted in the *Cable Modem NOI*.² The purpose of this ex parte is to demonstrate why these tentative conclusions are unnecessary to the determination of whether cable broadband Internet access services constitute "information services," and whether the transmission component of such services should not be subject to local regulation or open access requirements.

¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, ¶¶20, 25.

² *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185. See, e.g., February 20, 2002, ex parte of Adelphia at p. 3.

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Focal emphasizes it has no objection to the relief being sought by the cable industry in the *Cable Modem NOI*. However, there are three compelling reasons why the Commission should not rely on the tentative conclusions of the *Wireline Broadband Internet Access NPRM* in the event it decides to grant this relief.

First, there are fundamental legal and factual aspects of the cable transmission component of broadband Internet access which fully support the regulatory treatment sought by the cable industry without requiring the use of either tentative conclusion from the *Wireline Broadband Internet Access NPRM*. These include, but are not limited to, the fact that the cable transmission component of broadband Internet access has never been a common carrier offering, the fact it is not offered for a fee now or in the past, and the fact it has never been tariffed. Furthermore, cable companies do not meet the definition of section 251(h) of the '96 Act (and thus are excluded from the resale and unbundling obligations of section 251(c)), have not been found to be dominant providers of telecommunications, and have not been subject to CEI/ONA requirements.

Second, it would plainly be procedurally premature for the Commission to place any reliance upon its tentative conclusions before the competitive industry has had an adequate period in which to comment upon them. These positions were first advocated, to the best of my knowledge, in a January 9, 2002, letter from Verizon that was first made publicly available on February 21st, one week after the tentative conclusions were adopted.³ The point here is not to suggest anything untoward about Verizon's advocacy, but rather to make clear that the competitive community has not yet had a meaningful opportunity to explain the errors of the tentative conclusions to the Commission and its Staff.

³ Referenced at n.61 of the *Wireline Broadband Internet Access NPRM*.

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Third, it may turn out that the first tentative conclusion -- that wireline broadband Internet access services are "information services" -- proves entirely consistent with existing Commission precedent that distinguishes between "information services" and the telecommunications components used to provide those services. But this will depend on where the line between the two is drawn, and the NPRM is troubling in this regard. For example, xDSL is simply a transport protocol that supports greater bandwidth over local copper loops, bandwidth that can be used for ordinary telecommunications or for information services.⁴ Despite this fact, the NPRM states that "xDSL networks utilizing ATM transport [...] may provide for protocol processing, IP address number management, domain name resolution through domain name services (DNS), network security and encryption and caching." While various facilities (such as DSLAMs) and technologies (such as ATM) certainly can and do support these functions, the xDSL transport protocol does not. The NPRM's transformation of a simple transport protocol into "xDSL networks" providing information services thus may well signal serious line-drawing issues.⁵

The second tentative conclusion -- that the transmission component of wireline broadband Internet access services constitutes "telecommunications" rather than "telecommunications service" -- lacks any principle that would limit its application to broadband. Incumbents could easily and quickly convert all their services to enhanced services, and thus seek to escape section 251(c) completely.

In short, any utilization in the *Cable Modem NOI* of the tentative conclusions from the *Wireline Broadband Internet Access NPRM* would be unnecessary, procedurally inappropriate, and unfounded. Please let me know if I can answer any questions you may have about this important matter.

Sincerely,



⁴ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C. Rec. 24,011 (1998), ¶40: "We conclude that advanced services offered by incumbent LECs are either 'telephone exchange service' or 'exchange access.'"

⁵ *Wireline Broadband Internet Access NPRM*, ¶11, n5.

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